12-3000-15858-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF TRANSPORTATION

In the Matter of the Denial of Randall Fett's Application for an Outdoor Advertising Device Permit for a location off Interstate 90 in Hayward Township, Freeborn County, Minnesota pursuant to Minn. Stat. §§ 173.01-.27

FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION

This matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on May 17, 2004 at the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, MN 55401. The record closed at the conclusion of the hearing.

David L. Phillips, Assistant Attorney General, 800 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101, appeared on behalf of the Department of Transportation (Department).

Randall J. Fett (Petitioner), 88846 State Line Road, Glenville, MN 56036, appeared on his own behalf.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Transportation will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact the Commissioner of Transportation, 395 John Ireland Blvd., Mail Stop 100, St. Paul, MN 55155, to ascertain the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve the final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF THE ISSUES

Did the Department properly determine that the eastbound entrance ramp involved in this case is the "outmost ramp" for purposes of determining placement of Petitioner's requested advertising devices under Minn. R. 8810.1100, subp. 2?

Did the Department properly determine that advertising devices could not be permitted on Petitioner's narrow strip of property on the south side of Interstate 90?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. In 1967, the Department condemned certain property in Sections 1, 2, and 11 of Hayward Township in Freeborn County, upon which it built Interstate 90 (I-90)[1] I-90 runs almost perfectly east and west through Section 1, very near the south edge of the section. The uncondemned property in Section 1 south of the I-90 right-of-way is just some 65-75 feet wide along the western end of the section.[2]

2. A township road previously ran along the section line between Sections 1 and 2, and a drainage ditch ran along the east side of that, in Section 1. The Department cut off the road at I-90, but built a culvert under the freeway as a channel for the ditch. On the south side of the right-of-way, at the very west end of the uncondemned narrow strip in Section 1, the Department also condemned a 51.15 foot wide piece of land for a "channel change." The condemnation order reserved to the "owner" the right to use the channel change "for any purposes not inconsistent with the purposes" for which the channel change was acquired. In the "channel change," the Department rebuilt the ditch channel running south to the end of Section 1. At that point, the open ditch continues south along the township road. It also intersects there with a ditch coming from the east that runs just south of Section 1 in Section 12, and a ditch coming from the west out of Section 2.[3]

3. Going west from Section 1, into Section 2, I-90 curves to the northwest and crosses over Freeborn County Road 46 and some railroad tracks, both of which run generally southwest to northeast. The railroad tracks are on the northwest side of County Road 46. An intersection with County Road 46 was built at this point, with all of the entrance and exit ramps and loops on the southeast side of County Road 46, perhaps to avoid the railroad tracks. Most of the intersection right-of-way is in Section 2, but a small portion extends south into Section 11.[4]

4. On January 7, 2000, Petitioner and his wife Tamela B. Fett bought the land south of the railroad right-of-way in the west half of the west half of Section 1 and

in southeast quarter of Section 2, subject to highway and utility easements (the Fett property)[5]

5. Petitioner plans to develop Spirit of the West Resort & Waterpark, a family entertainment resort, on the Fett property. The development will include a hotel with theme suites, an indoor waterpark, a steakhouse and lounge, a 9-hole par 3 golf course, horseback riding, shops, a convenience store and filling station, and other amenities on various parts of the property.[6] Freeborn County strongly supports the development.[7]

6. The Fett property is shown in green on the Exhibit 2, the large right-of-way survey drawing of the area prepared by the Department. The largest portion of the Fett property is the area bounded on the south by the I-90 roadway, on the west by the westbound exit ramp to County Road 46, on the north by County Road 46, and on the east by the end of the property. It is about 2300 feet east to west and varies from about 600 to about 1400 feet north to south. It was referred to as Area 1 at the hearing. Most of the development would be in Area 1. Area 2 is a small area to the west of the large intersection and south of County Road 46.. Petitioner has plans to build the gas station and convenience store on Area 2. Area 3 is the land north of County Road 46 and south of the railroad. It is about 2100 feet east to west by about 100 feet for most of its length, tapering to about 30 feet at the east end. Area 4 is the long narrow strip south of the I-90 right-of-way and east of the channel change. It is about 1290 feet east to west and about 65 feet wide on the east and about 75 feet wide on the west at the channel change. A county drainage ditch 10 feet deep and 25 feet wide runs adjacent to southern border of Area 4 and joins with the north-south ditch that runs under I-90 and through the channel change. Area 5 is the long narrow strip south of the I-90 right-of-way and west of the channel change, measuring approximately 1120 east to west.[8]

7. At Petitioner's request, Freeborn rezoned the Fett property, except for Area 3, from agricultural to B-2, denoting a highway business district. Area 3 was not approved for re-zoning to B-2 due to lack of access to the property. However, Areas 4 and 5 were included in the rezoning.[9]

8. In late-December, 2003, or early-January, 2004, Petitioner submitted four Advertising Device Permit Applications to the Department's District 6 office in Rochester. Petitioner sought to erect four billboards advertising the resort and waterpark along I-90: two on the north side of I-90 in Area 1 and two on the south side of I-90 in Area 4.

9. By letters dated January 21, 2004, Thomas Streiff, the Department Sign Technician assigned to review Petitioner's applications, approved the two sign applications for the north side of I-90 and disapproved the two sign applications for the south side of the interstate.[10]

10. Under statute, advertising devices in business areas along freeways must be no closer than 500 feet from each other[11] and no closer than 500 feet from an interchange, as measured along the highway from the "pavement widening at the exit from or entrance to the main traveled way."[12] Minnesota Rules state that advertising

devices will not be permitted within 500 feet of the point where the outmost ramps or legs leave or enter the main traveled roadway.[13]

11. Mr. Streiff went to the site to determine the location of the points where the westbound exit ramp leaves the main roadway and the eastbound entrance ramp enters the main roadway. As visible on Exhibit 2, he found that the exit ramp pavement widening, or point of taper, starts at a point located at about 1252 + 80 feet on the map's measuring system. He found the eastbound entrance ramp's point of taper at about 1254 + 30 feet, some 150 feet farther east. Mr. Streiff considered that the point where the outmost ramp left or entered the roadway. He marked that point with lath on both sides of I-90. He then measured 500 feet east of that for the other sign and place a lath marker there. That mark was within a few feet of the east end of the Fett property.

12. Mr. Streiff's approval letter described the first approved permit location on the north side of I-90 as "outside the 500 foot spacing requirement from the east bound acceleration ramp taper." The second approved permit in Area 1 was "for a location outside the 500 foot spacing requirement from location #1." Given those spacing requirements, Mr. Streiff noted, concerning the second approved permit, that there did not appear to be sufficient distance to meet local ordinance set-back requirements because the sign location would be too close to the property line.[14]

13. In his letter disapproving the two locations south of I-90, Mr. Streiff cited 23 C.F.R. § 750.708(b), which requires state and federal entities to refuse to recognize zoning that was created primarily to permit outdoor advertising structures.[15] He viewed the situation such that there was no commercial use other than billboards for the narrow southern strip. Furthermore, the Freeborn County Land Use Ordinance setback requirements for structures in B-2 zoned areas requires a "front yard" of not less than 45 feet from the street right-of-way line and a "rear yard" of not less than 20 feet, thereby leaving little room to display a billboard at an appropriate angle. Similarly, he concluded that the access requirement of the ordinance could not be met. Mr. Streiff also considered whether he might be able to grant the two permits as "on-premise" advertising devices, but ultimately determined that no advertising devices in Area 4 could be recognized as "on-premise" because Area 4 was not contiguous to Area 1 where the resort will be located or Area 2 where the convenience store and gas station would be located.[16]

14. By letter dated March 4, 2004, Wayne Sorenson, the Freeborn County Planning and Zoning Officer, and Building Official, informed Department counsel that the County was in favor of Petitioner's resort project and supported the four billboards if they could be made to meet local setback and zoning requirements, which he thought might be possible. Mr. Sorenson stated that the project had the support of local mayors, township officials, county commissioners and legislators, due to the magnitude and high profile of the project.[17]

15. Petitioner objected to the Department's determination and appealed, in a timely manner, the denial of the two permit applications on the south side of I-90 and the placement of the signs on the north side.

16. Notice of Publication of the hearing date appeared in the Transportation Regulation Proceedings Notice and Hearing Bulletin on April 9, 2004. On April 12, 2004, the Department issued a Notice and Order for Hearing setting the hearing for May 17, 2004.

17. Freeborn County's bike trail association has spoken with Petitioner and proposed a bike path to run, in part, along Areas 4 and 5 along the south side of I-90. Petitioner is not opposed to this proposal and is considering opening a refreshment stand on Area 4 or 5 for the path users.[18] Mr. Streiff would not consider a bike path to constitute a commercial use.[19] Petitioner is also considering purchasing some of the land south of Areas 4 and 5 to be included in his development.[20]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department and the Administrative Law Judge have jurisdiction to consider this matter under Minn. Stat. §§ 14.50, 173.07, and 173.08.

2. The Department gave proper notice of the hearing and has complied with all applicable substantive and procedural requirements.

3. An "advertising device" is "any billboard, sign, notice, poster, display, or other device visible to and primarily intended to advertise and inform or to attract or which does attract the attention of the operators and occupants of motor vehicles…."[21] Petitioner's four proposed billboards are "advertising devices."

4. Mr. Streiff properly determined the point where the outmost ramps or legs leave or enter the main traveled roadway to be the start of the taper of the east bound acceleration (entrance) ramp in accordance with Minn. Stat. §173.16, subd. 4(d), and Minn. R. 8810.1100, subp. 2. His location of the first permissible advertising device at 500 feet east of that was therefore correct, as was his location of the second advertising device at 500 feet east of the first device.

5. Mr. Streiff properly determined that the narrow strip of land south of the I-90 right-of-way was too narrow and inaccessible to allow for any commercial structure other than possibly an advertising device was correct. Therefore, under 23 C.F.R. § 750.708(b), the zoning of it as B-2 cannot be recognized and the permits must be denied.

6. Minn. R. 8810.0200, subp. 6, defines an "on-premise sign" as an advertising device that identifies products or services associated with the property that is located on the premises or contiguous property. Federal law does not regulate on-property or on-premise advertising unless it is apparent that the outdoor advertising is improperly classified as on-property, such as signs on narrow strips of land contiguous to the advertised activity, when the purpose is clearly to circumvent federal law.[22] Mr.

Streiff correctly determined that an advertising devices on the Fett property south of I-90 would not qualify as in "on-premise sign."

Based upon the foregoing conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner **AFFIRM** the Department's determinations regarding Petitioner's Applications for Outdoor Advertising Device Permits.

June 14, 2004

s/Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Tape-recorded (2 tapes).

MEMORANDUM

Petitioner would like to display four signs advertising his new resort and waterpark on the interstate that runs through his property. Business signage along certain state and federal highways is subject to the Federal Highway Beautification Act the Minnesota Outdoor Advertising Control Act, and rules promulgated under those Acts. The Minnesota Outdoor Advertising Control Act states:

> It is hereby found and declared that in the interest of and to promote the general welfare of the people and to conserve the natural beauty of areas adjacent to certain highways, it is necessary to reasonably and effectively regulate and control the erection or maintenance of advertising devices on land adjacent to such highways. It is further declared that inasmuch as outdoor advertising is an integral part of the business and marketing function, an established segment of the national economy, and a legitimate commercial use of property adjacent to roads and highways, it should be allowed to operate where other business and commercial activities are conducted, and the regulation of outdoor advertising should occur by the application of reasonable regulatory standards consistent with customary use of outdoor advertising and zoning principles….[23]

Petitioner and the Department disagree as to which ramp at the I-90 intersection with County Road 46 is the outmost ramp. Petitioner argues that the exit ramp off of westbound I-90 is the outmost ramp, while the Department concluded that the entrance ramp onto eastbound I-90 is the outmost ramp.

Minn. R. 8810.1100, subp. 2, is clear that an intersection includes all ramps and legs to their outermost points. The Department notes that entrance ramps are generally longer than exit ramps to allow adequate time and space for traffic merging onto the highway to gain entry to the flow of traffic. In the same vein, advertising devices are not permitted for 500 feet after the end of the merging lane, on either side of the roadway, so as to reduce distraction and aid in public safety for those using the interstate.

In Petitioner's view, the outmost ramp is the ramp itself that is furthest from the point where I-90 and County Road 46 intersect. He apparently relies upon the fact that the exit ramp, which meets County Road 46 further from where the interstate crosses over County Road 46 than the entrance ramp, to argue the exit ramp is the outmost ramp. But both the statute and rule make it clear that it is the point where the ramp leaves or enters the interstate that determines to outmost point and ramp. That makes sense, because it is the safety and appearance of the main roadway that is being protected, so it would make no sense to measure it from the place the ramp meets the cross road.

Petitioner also asserts that the taper on the entrance ramp is so gradual and minute as to be negligible. He is correct that it is impossible to see the point of taper on Exhibit 2. But Mr. Streiff's testimony as to its visibility on the roadway itself and consistency with the Department's highway design practices is credible. Moreover, the rule requires that the entrance and exit points of all ramps be determined.

Federal regulations require the Department to disregard the business rezoning of Areas 4 and 5 because it is apparent from the shape and size of the property and the testimony of Petitioner, that there is no valid commercial use to which the property could be put and that Petitioner currently intends to use Area 4 only for purposes of erecting advertising devices.

S.M.M.

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[1] Ex. 1.
[2] As measured on Ex. 2.
[3] Exs. 1 at 10, 2 and 4.
[4] See Exs. 2, 4, and 12.
[5] Exs. 2, 3, and 12.
[6] Ex. 13.
[7] Ex. 11; Testimony of Randall Fett.
[8] Exs. 2 and 5.
[9] Ex. 9 and 11; Testimony of Thomas Streiff and Randall Fett.
[10] Exs. 7 and 8.
[11] Minn. Stat. § 173.16, subp. 4(b).
[12] Minn. Stat. § 173.16, subp. 4(d).
[13] Minn. R. 8810.1100, subp. 2.
[14] Ex. 7; Testimony of Thomas Streiff.
[15] The letter also cited Minn. R. 8810.0900, subp. 3, for the same authority. However, that rule prohibits recognition of business zoning in different circumstances.
[16] Ex. 9: Testimony of Thomas Streiff.

[17] Ex. 11.
[18] Testimony of Randall Fett.
[19] Testimony of Tom Streiff.
[20] Testimony of Randall Fett.
[21] Minn. Stat. § 173.02, subd. 2.
[22] 23 C.F.R. ch.1, § 750.709(d)(3).
[23] Minn. Stat. § 173.01.